

that 'without prejudice' communications should not be looked at by a court without the consent of both parties. It was a case of a without prejudice offer which the defendant successfully used at first instance to deprive the plaintiff of costs as the plaintiff recovered less than the offer. *Walker v Wilsher*⁴ has in the very recent past been 'explained' and 'qualified' by Sir Robert Megarry VC in *Computer Machinery Co Ltd v Drescher*⁵ at p 156 and by the Court of Appeal in *Cutts v Head*⁶ as to be of little authority today.

For the reasons given above, I am of the view that this appeal must be allowed with costs here and below.

Appeal allowed.

Solicitors: *Goh Poh & Partners; Lee & Lim.*

Reported by *Terence Tan Bian Chye*

Loh Jue Tee & Anor v Low Chick Sum

HIGH COURT (SINGAPORE) - DISTRICT COURT APPEAL
NO 87 OF 1987
CHAN SEK KEONG J
28 JULY 1989

Tort - Negligence - Motor accident - Issue of which party was at fault - Breach of Highway Code

Civil Procedure - Appeals - Trial court's finding of fact - Appellate court's ability to overturn findings

A pick-up van driven by the defendant and a motorcycle ridden by the second plaintiff were involved in a collision, as a result of which the first and second plaintiffs suffered injuries. The defendant was sued for damages. It was not disputed that the accident occurred as the defendant's van was making a left hand turn. The district judge dismissed the claim and held that the second plaintiff was responsible for the accident. The plaintiffs appealed. The plaintiffs argued that the judge had made inferences and it was open to the appeal court to overturn these inferences.

Held, allowing the plaintiffs' appeal:

(1) It is well established that an appellate court will not normally disturb the findings of fact of the trial judge based upon an evaluation of the oral testimonies of the parties and their witnesses as he is in a far better position to assess their credibility having seen and heard them. However, where the findings of fact on which the decision is based are themselves inferences from the primary facts, the appellate court is in as good a position as the trial judge.

(2) The judge's decision was not based on his assessment of the truth of the witnesses but drawn as inferences from the police reports of the parties.

(3) All findings of fact should depend on the relative probabilities of the testimonies of the witnesses in the light of such other objective evidence as may be relevant.

(4) Based on all the evidence, the court found that the defendant was in breach of r 74 of the Highway Code. He was totally to blame for the accident. The appeal was allowed with

A costs at the High Court level and below. The case would be remitted back to the trial judge for assessment of damages.

Case referred to

1 *Foong Yit Yoon v Yap Tiam & Anor* [1963] MLJ 104 (folld)

B *Johnny Seah* for the plaintiffs.
Brij Raj Rai for the defendant.

Cur Adv Vult

Chan Sek Keong J: This is an appeal by the plaintiffs against the decision of the district judge dismissing the plaintiffs' claim against the defendant for damages for personal injuries suffered by the plaintiffs as a result of a collision between a pick-up van No GF 6713Y driven by the defendant and a motorcycle No AZ 3705 ridden by the second plaintiff with the first plaintiff as pillion rider.

D The collision occurred along Clementi Road on 28 August 1982 at about 4.30pm near the entrance to Ngee Ann Technical College ('NATC'). At that junction, Clementi Road was a dual carriageway with three lanes going towards Bukit Timah Road and the other three lanes going in the opposite direction. Both the second plaintiff and the defendant reported the accident separately to the traffic police a few hours after the accident. The second plaintiff's report was as follows:

F On 28 August 1982 at about 1630 hours at Clementi Road, I was riding my motorcycle carrying one pillion (tel: 4684659), at a speed of about 60 km/h, travelling at the left lane of the road behind a pick-up GF 6713 turned without giving signal and I could not avoid but collided onto the front left side of the pickup.

The motorcycle fell and my pillion was injured. Ambulance conveyed us to Alexandra Hospital. Nobody was injured in the pick-up. The pick-up was dented slightly on the left front part. No rain and visibility clear. That is all.

The defendant's report was as follows:

G On 28 August 1982 at about 4.15pm, I am driving along Clementi Road intending to make a left turn to Ngee Ann College. Whilst driving, before I made a left turn of Ngee Ann College, I switched on my left signal indicator, suddenly a motorcycle AZ 3705C came on my left side, whilst I was about to turn, the said motorcycle grazed onto the left side of my motor pick-up. As a result the motorcyclist's pillion was injured, on the hand and right leg. My motor pick-up left side was damaged, the side mirror broken.

I At the trial, the testimony of the second plaintiff was substantially the same as what he had said in his police report save for the elaboration that the traffic was moderate and that the pick-up van was travelling in the middle lane of the three-lane road going towards Bukit Timah Road when the van turned suddenly into the entrance into NATC. He also said that he was not trying to overtake the van and that he could not remember which part of the van he collided into. He was asked to mark (which he did) the point of impact with an 'X' on the police sketch plan of the scene of accident. The first plaintiff, in his testimony, cor-

roborated the evidence of the second plaintiff. He remembered seeing a blue shadow suddenly moving across the path of the motor-cycle.

The defendant testified that when he was approaching NATC, he signalled, looked at the rear view mirror and then turned left into the entrance to NATC, that as he was doing so, the motorcycle collided into his van. He also said that before he made the turn, he was travelling on the innermost left lane. Under cross-examination, he claimed (a) that he was travelling on this lane all the way after turning into Clementi Road from Jalan Ahmad Ibrahim; (2) that he switched on the indicator light about four to five car lengths from the entrance into NATC; (3) that on looking at his rear mirror he saw a motor car, but *not* the motorcycle, behind him travelling in the same lane; and (4) that he did not look at the left wing side mirror before he turned. The defendant had two passengers in his car at the time of the accident. One of them appeared as a witness to testify (1) that the van had travelled for about two miles on the extreme left lane whilst keeping to the centre of the lane; and (2) that the defendant did signal before turning left into NATC as he heard a 'tick tick' sound.

At the end of the trial, the district judge found that the defendant was not negligent and that the second plaintiff was wholly to blame for the collision. In his grounds of decision, he gave the following reasons for his finding:

The plaintiffs and defendant told conflicting stories. Each party was trying to put the blame on the other. In order to verify the evidence the court had to rely on evidence such as the police report. The second plaintiff stated in his report that he was travelling on the left lane of the road behind a pick-up GF 6713Y. The vehicle turned without giving signal. The defendant said that while he was about to turn the motorcycle grazed his left side. He had switched on his left indicator.

From the above it clearly showed that the second plaintiff was following behind the defendant. Both he and the defendant were travelling on the left lane. While the defendant was turning the plaintiff must have grazed him and then landed in the position marked 'M'. There was a scratch mark leading to position 'M'. The second plaintiff confirmed under cross-examination that the collision took place at the point marked 'X'. Obviously, the second plaintiff was trying to overtake the defendant on the left side. From the point of impact and the scratch mark the collision could not have happened in the way described by the second plaintiff, otherwise on a head to side collision the motorcycle would remain at the point of collision. This confirmed that the defendant did not suddenly swerve left from the centre lane to the left lane as alleged by the second plaintiff. Hence, the second plaintiff was the sole cause of the accident. He must have tried to overtake the defendant who was turning to its left, then grazed the defendant's vehicle and landed on point marked 'M'.

Counsel for the plaintiffs have submitted that the findings of fact of the district judge were inferential findings and that he was in error in making such findings. It is well established that an appellate court will not normally disturb the findings of fact of the trial judge based upon an

A evaluation of the oral testimonies of the parties and their witnesses as he is in a far better position to assess their credibility having seen and heard them. However, where the findings of fact on which the decision is based are themselves inferences from primary facts, the appellate court 'is in as good a position, or as bad a position, as the trial judge to form a view as to what happened' (per Thomson CJ in *Foong Yit Yoon v Yap Tiam & Anor*¹ at p 108).

B Counsel for the plaintiffs submitted before me that the district judge's finding that the defendant was not negligent was based not on his assessment of the truth or otherwise of the parties who gave evidence, he being C unable to come to any conclusion as to whom to believe, but primarily on inferences drawn from the police reports of the second plaintiff and the defendant.

I agree. The extract I have quoted from the trial judge's grounds of decision shows that the findings of the trial judge upon which he found the second plaintiff was D solely to blame for the collision were as follows: (1) the pick-up van was on the extreme left lane of the road and the second plaintiff was following it on the same lane; (2) the collision occurred at the point 'X' on the sketch plan as marked by the second plaintiff; (3) from the point of impact and the scratch mark leading to the final position E of the motorcycle, 'M', the collision could not have happened in the way described by the second plaintiff, ie on a head to side collision, as the motorcycle would have stopped dead at the point of collision; in other words, it was not a head to side collision; (4) from this, it would follow that the motorcycle must have been trying to F overtake the pick-up van; and (5) therefore the van did not suddenly swerve left from the centre lane.

Every single finding of fact set out above is an inferential fact. This court is therefore in as good a position as the trial judge to assess the correctness of these findings of G fact. The trial judge did not believe the second plaintiff's version of how the collision occurred primarily because it could not have occurred in the manner described by him having regard to the point of impact as marked by him on the police sketch plan. In my view, the trial judge was wrong in accepting as correct the point of impact as marked by the second plaintiff. The trial judge should H have, in the light of the other objective evidence, considered whether the second plaintiff's account was consistent with the other objective evidence. The second plaintiff obviously had a faint recollection of an event which had occurred more than five years earlier. This is proved by his candid admission in his evidence-in-chief that he could I not even remember where his motorcycle had collided into the pick-up van.

To make it easier to follow my analysis, I annex hereto a copy of the sketch plan. In my view, the point marked 'X' could not be the point of impact because it is well beyond the point at which the van was damaged. According to the

report of the traffic police who inspected the scene of the accident as well as the two vehicles immediately after the accident, the pick-up van was damaged in three places, viz (1) the front rearside door dented; (2) front rearside bumper dented; and (3) rearside wing mirror dented. It must therefore follow that the point of impact was at a spot before the spot marked 'X'. The position of the van as shown in the sketch plan merely showed its position after and not before the collision. The van had come to a stop after the collision but it is a scientific fact that no moving force like a motor vehicle in motion, can stop dead unless it meets an irresistible force, even if its brakes are 100% effective. The second plaintiff's marking should have been rejected as an obvious error. It follows that the second plaintiff's description that the collision was a head to side collision was consistent with the objective evidence. In fact, and this was also ignored by the district judge, the defendant in his police report had also, like the second plaintiff, made a tick against the printed description 'head to side' collision.

On this basis, how did the collision occur? It could only have happened if the van turned into the path of the motorcycle. That this was how the accident occurred was confirmed by all the witnesses including the parties to the action. The question is whether the second plaintiff attempted to overtake the defendant, as found by the district judge, or whether the defendant turned his van suddenly into the entrance of NATC.

In my view, any finding on this is dependent on the relative probabilities of the testimonies of the parties and their witnesses in the light of such other objective evidence as may be relevant. At the entrance to NATC, the width of the three-lane road was 3.90m. The width of the van was 1.60m. The motorcycle was not measured but its width must have been one to two feet. If, as was alleged by the defendant's witness, the van had been travelling in the centre of the left lane all the way from Jalan Ibrahim up to the point of collision, that would leave to a vehicle following the van a free passageway between the curb of the road and the van of about 1.15m. Therefore, if the second plaintiff had been trying to overtake the van, he was doing an extremely hazardous and reckless act. There is no basis for coming to this conclusion. If he had wanted to overtake, it would have been easier and safer to overtake on one of the other two outer lanes.

However, the district judge in effect came to this conclusion by finding that the defendant was travelling on his innermost left lane *because* the second plaintiff had stated in his police report that prior to the accident, he was travelling *behind* the van. This inference is not irresistible. If X says that he is travelling on the left lane behind Y who says that he is travelling on the left lane, both X and Y would be travelling on the left lane if both are found to be telling the truth. In this case, the second plaintiff testified that the defendant was travelling in the centre

A lane. The defendant, of course, denied this and said that he was travelling on the left lane. *But*, the district judge made no finding as to who was telling the truth. He merely inferred from these two statements that both the second plaintiff and the defendant were travelling on the same lane.

B Now, of course, the word 'behind' is ambiguous when used to describe, without more, a vehicle following another vehicle on a road with more than one lane going in the same direction. In the present case, it was used by an English speaking constable in interpreting the words of the second plaintiff spoken in a different language. In court, the second plaintiff had explained what he meant when he testified that he was behind the van which was travelling in the centre lane. There is no inconsistency between this statement and what he had said in his police report. The district judge should have made a finding as to where the defendant was travelling just before the collision.

D What then was the probability, on the evidence, of the defendant having been travelling on the innermost left lane as he had alleged? Here, the district judge has failed to take into account the evidence of the defendant on a related point. The defendant admitted that when he looked at the rear mirror he never saw the motorcycle. There are only two possible reasons to explain why he did not see the motorcycle. The first is that he never looked into the rear mirror at all before turning. The second is that he looked but since the motorcycle was travelling on his left, he could not see the second plaintiff. If the first explanation is correct, the defendant was lying. If the second explanation is correct, the more probable inference would be that the defendant was then travelling on the centre lane and the second plaintiff on the inner lane. That would explain why the defendant never saw the motorcycle. In my view, that is certainly a more probable explanation than to infer that the second plaintiff was doing a dangerous act by riding side by side the defendant's motorvan and trying to overtake the defendant.

F For these reasons, I have come to the conclusion that the correct inference to draw from the evidence was that, on a balance of probabilities, the defendant had suddenly swerved left from the middle lane into the entrance of NATC and caused the second plaintiff to collide into the van. In my view, the defendant was in breach of r 74 of the Highway Code. He was wholly to blame for the accident.

H The appeal is allowed with costs here and below. There will be judgment for the plaintiffs. As the trial judge has not assessed damages, I remit the case back to him for such assessment.

Appeal allowed.

Solicitors: *Seah & Co; Rajah & Tann.*

Reported by *Terence Tan Bian Chye*